**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **JACK D. BROWN** | ) | |
| Claimant | ) | |
| VS. | ) | |
| | ) | Docket No. 1,019,519 |
| **BEACHNER SEED COMPANY** | ) | |
| Respondent | ) | |
| AND | ) | |
| | ) | |
| **LIBERTY INSURANCE CORPORATION** | ) | |
| Insurance Carrier | ) | |

## ORDER

Respondent and its insurance carrier appealed the October 13, 2006, preliminary hearing Order entered by Administrative Law Judge Thomas Klein.

## ISSUES

Claimant injured his back and left arm in a May 28, 2004, accident that arose out of and in the course of his employment with respondent.

At an October 4, 2006, preliminary hearing, claimant argued that respondent and its insurance carrier should be required to pay assisted living expenses that were incurred after December 22, 2005, which was the date that Dr. Douglas Richards prescribed assisted living services. Conversely, respondent and its insurance carrier argued those services, which were rendered in a facility rather than at claimant's residence, were not related to claimant's work injury. Consequently, respondent and its insurance carrier objected to claimant's request for payment. After considering the evidence, Judge Klein ordered respondent and its insurance carrier to pay the assisted living expenses claimant incurred at Guest Home Estates in Erie, Kansas. The Judge wrote:

> Claimant began living in March 2005 [in] assisted living after a fall at home, subsequent to a work injury. Dr. Johnson thought a skilled nursing facility might be needed at that time. In a report of 2-21-06, Dr. Johnson thought home health services might be appropriate, but not a skilled nursing facility. Dr. Richards prescribed assisted living on 12-22-05.

> I find that the services provided to the Claimant are better described as assisted living rather than a skilled nursing facility, and that those services are related in part, to the work injury. The bills from the guest House in Erie Kansas are ordered paid as authorized.[1]

Respondent and its insurance carrier contend Judge Klein erred. They argue claimant has failed to prove the assisted living services in question are related to his May 2004 accident. Moreover, they suggest those services are related to a subsequent hip fracture and myocardial infarction, which they contend are not related to the work injury. In addition, respondent and its insurance carrier contend claimant did not fracture his hip when he fell on a ramp at home as he told several medical providers that he tripped over a brick or that he tripped while operating a roto-tiller.

Claimant, on the other hand, argues Dr. Richards' prescription establishes in no uncertain terms that the assisted living expenses are related to claimant's back and arm injuries. In addition, claimant argues in his brief to this Board that his March 2005 fall and hip fracture are related to his work injury.[2] Accordingly, claimant requests the Board to affirm the October 13, 2006, Order.

As respondent and its insurance carrier do not dispute that they are required to provide claimant home health services,[3] the only issue on this appeal is whether claimant has proven the assisted living services he has received, or those he may presently need, are related to his May 2004 accident.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds and concludes the preliminary hearing Order should be reversed.

This claim returns to the Board for a second time. The issue presented to the Board in the first appeal was whether the nursing home services claimant needed following his hip fracture were related to his May 2004 accident. The Board found there was a significant lack of evidence regarding why claimant required nursing home care and,

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[1] ALJ Order (Oct. 13, 2006).

[2] But at page 7 of the October 4, 2006, preliminary hearing transcript, claimant's attorney stated he was not there to litigate how or where claimant's fall and fractured hip occurred as he had a document indicating the need for medical treatment was due to claimant's back and arm injuries and not from the heart attack or broken hip.

[3] P.H. Trans. (Oct. 4, 2006) at 37.

therefore, the Board denied claimant's request for that care. In its November 30, 2005, Order, the Board wrote in pertinent part:

> This matter was first litigated before the ALJ in February 2005. At that hearing, the issue was whether respondent should be made to pay for claimant's ongoing home health care. At that point in time, compensability of the May 28, 2004 accident was not disputed. Claimant fell seven feet out of a truck, hitting his head, shoulders, back and leg before passing out. It was also uncontroverted that claimant's course of care has been difficult. He has been in and out of the hospital due to blood clots and other complications. Following one discharge, he required a ramp to walk in and out of his house. On March 19, 2005, claimant tripped on a screw in the ramp and broke his hip. Apparently, when he was discharged from the hospital, his family could not care for him appropriately and home health care was suggested by a physician who had been treating claimant at the hospital.
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> A second preliminary hearing was held on August 24, 2005 and much the same issues were addressed, although the focus was on nursing home care rather than home health care as claimant was now confined to a facility for rehabilitation. Claimant's counsel indicated that claimant's fall on the ramp caused him additional injuries that necessitated a stay in a nursing home. No medical records were produced at this hearing, just bills indicating that service had been provided. . . .
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> A careful review of the record reveals a significant lack of evidence regarding the sequence of events and the reason why claimant presently requires nursing home care. Following his initial injury, claimant was able to remain in his home with help from his daughter and home health care. He subsequently experienced another fall on a ramp outside his home and while in the hospital under treatment for that fall, he suffered complications apparently due to a heart condition. It is wholly unclear from the record whether claimant presently requires nursing home care for his injuries due to the fall or whether it is due to this ill-defined heart condition vaguely described by his daughter during her testimony. It is equally unclear whether the complications to his heart are causally related to the underlying injury, his subsequent fall or wholly unrelated to his work-related condition. All of these unanswered questions effectively defeat claimant's request that the medical expenses associated with his nursing home care be paid by respondent. Having failed to meet his burden of proof on the causal link between his compensable injury and his present need for nursing home care, the ALJ's preliminary hearing Order must be reversed.[4]

[4] *Brown v. Beachner Seed Company*, No. 1,019,519, 2005 WL 3408001 (Kan. WCAB Nov. 30, 2005).

Respondent and its insurance carrier do not dispute that claimant requires home health services due to his May 2004 accident. Accordingly, the issue in this appeal is whether claimant has proven assisted living services should be provided within the confines of a facility due to his work-related injuries.

At the October 2006 preliminary hearing, claimant's daughter Rhonda Brown testified claimant had been released by the doctors who had treated him for his fractured hip and heart attack and that he had no appointments to follow up with them. Ms. Brown believes her father needs the same kind of assistance now that he needed before his subsequent hip fracture and myocardial infarction but such care should be provided in an assisted living facility rather than his own home because he fell going down the ramp that was constructed at his residence. More importantly, she testified following her father's fall and hip fracture he was not clear in his thoughts and he would sometimes give an inaccurate history.

On December 22, 2005, Dr. Richards wrote a prescription for claimant to receive assisted living services due to his back and arm. It reads:

> Mr. Brown needs the assisted living Guest House provides due to his back & arm injuries. This will be for an indefinite time period[.][5]

To counter Dr. Richards' opinion, respondent and its insurance carrier presented the February 21, 2006, medical report of Dr. Kenneth W. Johnson. In that report, Dr. Johnson, who last saw claimant in May 2005, indicated claimant may need home support services for assistance but that he did not believe claimant required skilled nursing facility care.

In short, before claimant injured his hip and suffered a myocardial infarction he lived in his home and received home health care services. Claimant now contends that he has recovered from his hip fracture and myocardial infarction and that he needs the same type of home health care services that he received before those maladies. Only now he requests those services be provided in a facility rather than in his home. Other than Ms. Brown's concern that claimant fell at home and fractured his hip, there is a glaring absence of evidence why claimant should reside in an assisted living facility due to his work-related injuries rather than reside at home and receive home health care services. And Dr. Richards' prescription for assisted living services provides no information why claimant would need assisted living services in a facility due to the injuries that he received in his May 2004 accident.

[5] P.H. Trans. (Oct. 4, 2006), Cl. Ex. 2.

Based upon this record, the undersigned Board Member finds claimant has failed to establish that it is more probably true than not that he requires assisted living services or home health care services in a facility due to his May 2004 work-related accident. Accordingly, the October 13, 2006, Order should be reversed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[6] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2005 Supp. 44-551(b)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

At the October 2006 preliminary hearing respondent introduced approximately 468 pages of medical records from the Labette County Medical Center. Many of those records, some of which go back to 1982, have no probative value regarding the issues now in dispute. The parties are reminded that evidence should be confined to the matters in issue and only those records that have probative value need be admitted.

**WHEREFORE**, the October 13, 2006, Order is reversed.

**IT IS SO ORDERED.**

Dated this ____ day of January, 2007.

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
John R. Emerson, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge

[6] K.S.A. 44-534a.